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Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

Marcus C. Ellis,

Petitioner.

v.

The Honorable Russell G. Heldman,
Robert Todd Jackson, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Marcus C. Ellis,
appearing *pro se*
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6309

Questions Presented

Question No. 1

Should absolute immunity for witness testimony be extended to shield from civil liability defendant-witnesses jointly participating in alleged extra-judicial conspiracies to present false and incomplete testimony? [A split exists among Circuits.]

Question No. 2

Whether this Court should compel the lower courts to apply its holding in *Tower v. Glover*, (cite omitted), that otherwise private attorneys **are** liable in properly stated Section 1983 conspiracy cases?

Question No. 3

Whether this Court should set forth rules governing the articulation of factual findings when Section 1988 awards are made?

List of Parties

Petitioner: Marcus C. Ellis

Respondents:

The Honorable Russell G. Heldman, Chancellor
Robert Todd Jackson,
Candi Noelle Chaffin,
David W. McMillan
Frances Rogers
The Exchange Club

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Opinions Below

The opinion of the court of appeals (App., *infra*, 1.20) is reported at 55 Fed.Appx.742, 2003 WL264744 (6th Cir. Tenn) Feb. 6, 2003.

The opinion of the District Court, issued in a bench ruling (App., *infra*, 1.2 "Excerpted Transcript of Proceedings") and incorporated in the "Memorandum" (App., *infra*, 1.13) supporting the Order granting fees and costs (App., *infra*, 1.17) is unreported.

Jurisdiction

The Court of Appeals judgment was entered on Feb. 6, 2003. Timely motion for rehearing en banc was denied April 28, 2003. The jurisidiction of this Court is invoked under 28 USC Section 1254.

Statement

Question No. 1 of this Petition raises the important, recurring question as to whether absolute immunity for the content of a witness' testimony, per *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96, (1983) should be extended to shield witnesses from liability when Section 1983 lawsuits base their claims *not* simply upon alleged testimonial fraud, but allege non-testimonial, extra-judicial conspiracies to provide false and incomplete testimony. There is a conflict among several Circuits in resolving this important Question.

Question No. 2 of the Petition concerns this Court's holding in *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758, (1984), which confirms the liability under Section 1983 of otherwise private attorneys who allegedly conspire with state actors to deprive federally-protected rights. In the courts below,[1] *Tower* was disregarded. The defendant attorney was held to be "not a state actor" thus not liable to suit, pursuant to *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509, (1981), notwithstanding explicit allegations supporting Petitioner's claim that the attorney had participated in a conspiracy involving a state actor resulting in deprivation of Petitioner's federally-protected parental rights. Ultimately, Petitioner requests the Court protect its own precedent by compelling the lower courts to analyze, pursuant to *Tower v. Glover*, the alleged conspiratorial acts of the attorney to determine whether they state a claim.

Similarly, **Question No. 3** seeks to invoke the Court's supervisory jurisdiction to set forth rules governing the articulation of factual findings when awards of attorneys fees and costs are to be made. Petitioner contends that the lower courts abused their discretion by awarding fees and costs when both Courts' decisions appear to be lacking in findings or record evidence.

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[1] Jurisdiction of the district was invoked under 28 USC Sec.1331.

Since this case brings into issue the grant of the defendants' Rule 12(b)(6) motions, Petitioner respectfully suggests that a brief synopsis of the allegations against each defendant from his Third Amended Complaint[2] is appropriate.

Excerpted Complaint Allegations

Petitioner's former counsel, a young attorney from Texas, initiated this federal cause by setting forth in his original complaint extensive, non-conclusory factual allegations centering on an alleged conspiracy to present false and incomplete testimony during a Tennessee divorce proceeding. Plaintiff/Petitioner claimed that said conspiracy resulted in 1.) wrongful suspension for nearly one year of his federally-protected right to parent his toddler, and 2.) numerous violations of his 14th Amendment right to due process.

The alleged conspirators include the state-court chancellor, who was disqualified mid-divorce by the State of Tennessee as in numerous other cases,[3] three supposedly "independent experts" he inserted into the divorce, Petitioner's former wife and her divorce attorney.

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[2] The "Third Amended" is the live complaint before the Court. It was written by the *pro se* Petitioner, after his young counsel resigned without notice in response to various sanctions motions against him. It is an attempt to correct alleged defects of the complaints written by his former counsel.

[3] See Appendix, pg. 1.1, for excerpted text of holdings by the Tennessee Court of Appeals in *Hoalcraft v. Smithson*, 2001 WL 775602, (Tenn.Ct.App.) and *Earls v. Earls*, 2001 WL 504905, (Tenn.Ct.App.). Said Court has repeatedly reversed and dismissed the chancellor for violations of due process.

In deference to the chancellor's immunity, counsel sued him only for attorneys fees and declaratory judgment as to whether his acts in support of the conspiracy were "judicial". Counsel sued the other defendants, aware that liability for participating in a Section 1983 conspiracy with a state actor may be imposed on private individuals, even though the state actor himself is immune from suit. *Dennis V. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

Inter alia, Plaintiff/Petitioner alleged that the chancellor suspended Petitioner's parental rights without comparative fitness findings of both parents [as mandated by Tennessee law in cases involving suspension of parental rights], and thereafter manipulated the divorce litigation to create and enter into the record after-the-fact "evidence" in order to prevent his supervising Court from reversing that naked suspension. [Third Amended Complaint, pp. 85, *et seq.*]

More specifically, as alleged in Petitioner's Third Amended Complaint, the chancellor inserted into the divorce a series of three ostensibly "independent experts", two of which have been subsequently discovered to be under the control of the first appointed expert, the defendant psychologist. *Id.* pp.70-73.

[Petitioner admits that in light of the fact the defendants are immune for the content of their testimony, his *pro se* Complaint should not have related contradictions in the reports and testimony of the defendants, his Complaint's disclaimer notwithstanding.[4] However,

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[4] Third Amended Complaint, paragraph 5: "Plaintiff respectfully draws the attention of the Court to the fact that he is not requesting the Court make any determination of the truthfulness or accuracy of the contradictory statements Defendants Chaffin and McMillan made under oath in the state court, as presented herein. Their inclusion serves only to provide the Court a flavor of the behavior which those defendants have committed while violating Plaintiff's parental and due process rights."

Petitioner contends his relation of numerous acts committed by the witnesses *off the stand* in support of their alleged conspiracy, more than suffices to state a claim .[5]]

Petitioner further alleged that nine months after the chancellor ordered the naked suspension of parental rights without comparative fitness findings required by Tennessee law, the defendant psychologist personally paid and supervised one of the other so-called "experts",[6] Defendant Fran Rogers, to create the missing comparative fitness evidence. Petitioner contended that in so doing, the psychologist had paid Rogers to "exceed the scope of her appointed duty", which was solely to supervise eight of the sixteen hours Petitioner was granted to visit with his daughter during 2001. *Id.*pp.70. [The eight hours visitation was ordered by the defendant chancellor to occur at the defendant Exchange Club, which has also been discovered to be under the control of the psychologist.[7]]

Petitioner further alleged that the chancellor colluded with the defendant psychologist to enter the missing "comparative fitness evidence" created by Rogers into the record of the divorce during a hearing, although Rogers never appeared in court. *Id.*pp.86. Petitioner contends that by entering her "findings" into the record in her absence, the

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[5]If read liberally, Petitioner contends the complaint clearly shows that the defendants conspired to create, present and manipulate false and incomplete testimony as colorable justification for the unjust suspension of his parental rights.

[6] As alleged in the complaint, pp. 72 *et seq.*, Defendant Rogers has been discovered to be an uncertified layperson, who moonlights on the psychologist's payroll.

[7] As related in paragraph 72 of the Complaint, the defendant psychologist admitted in deposition related to the divorce that his wife created the parental exchange service offered by the Club, that he interchanges his own funds with those of The Club, and that he creates and enforces Club policy.

chancellor concealed Rogers' employee/ employer relationship with the psychologist, and the laywoman could not be cross-examined as to her alleged "expert" "findings". *Id.* pp. 86.

With more specific regard to Petitioner's allegations of the non-testimonial actions taken by his former wife, [Defendant Chaffin], and her attorney, [Defendant Jackson], in support of the conspiracy, the Complaint sets forth multiple apparent instances of subornation of her perjury by the attorney. For example, Petitioner related detailed, secretly tape-recorded admissions and allegations *by Ms. Chaffin* given during a private meeting she initiated and held with Petitioner during the divorce. On said recordings, Ms. Chaffin alleged that, *inter alia*, Defendant attorney Jackson had "fabricated" certain facts, "embellished" certain others, and in general assisted her to present what she characterized as "a completely inaccurate picture" of Petitioner and her case to the chancellor which directly culminated in suspension of Petitioner's parental rights. *Id.* pp.53-54.

When Ms. Chaffin's tape-recorded allegations against him were revealed, Mr. Jackson responded by authoring and having her swear to an affidavit wherein she claims that all her tape-recorded allegations against Jackson were supposedly "not true", i.e. lies. *Id.* pp.75-76. Mr. Jackson then filed the Chaffin affidavit of recantation into the divorce while *simultaneously* urging the divorce court to fully rely on every allegation Ms. Chaffin made against Petitioner during the case. *Id.* pp.78. The chancellor repeatedly denied Petitioner any opportunity to set a hearing to present Ms. Chaffin's tape-recorded admissions and allegations. *Id.* pp. 80, *et seq*.

When Petitioner sought extraordinary, interlocutory relief from the Tennessee Court of Appeals regarding the chancellor's insertion of the missing "comparative fitness evidence", the chancellor was summarily disqualified. Previous to the next hearing in the divorce, defendant attorney Jackson resigned from the case. And at that very

next hearing in the divorce, the replacement chancellor found no evidence to support the suspension of Petitioner's parental rights. *Id.* pp.95. The new chancellor immediately reinstated liberal unsupervised visitation and dismissed the defendant psychologist, whose secretly-related "independent experts" vanished with him.

Disposition by the Courts below: The District

After Petitioner's young counsel filed his original Complaint, it was met by Rule 12(b)(6) Motions from each defendant. The defendants also attacked the young attorney, filing a "Rule 11 Motion" and a "Joint Motion to Show Cause" which raised questions as to

1.) whether or not Petitioner's young lawyer had actually signed six certain documents relating to the case or had improperly allowed his secretary to sign documents "by permission", and

2.) whether or not the lawyer had impermissibly alleged in various iterations of his complaints that perjury charges in a state court were pending against two of the defendants, and

3.) whether or not the attorney had made certain statements "without reasonable inquiry, factual basis or for harassment or to be vexatious".

Only one hearing was ever held in this federal case, April 19th, 2002, the Honorable Judge William Haynes presiding. During the bulk of that hearing, Judge Haynes focused exclusive attention and careful particularity on each allegation of the defendants' sanctions motions against Petitioner's young counsel, discussing at length every allegation. Conversely, however, during the later portion of the hearing focusing on the Rule 12 motions of the defendants, i.e., the merits of the case, Judge Haynes did not discuss or mention one single allegation of the defendants' conspiratorial acts related by Petitioner. Then, at the conclusion of the hearing, Judge Haynes read into the record his "bench ruling". As to the merits, he granted each

defendant's Rule 12 motion but, again, never mentioned the gravamen of the case, e.g. the conspiracy of the defendants. Not only did he decline to even mention the word "conspiracy" in his ruling, Judge Haynes again failed to mention or comment on even one factual allegation of Petitioner's Complaint. Instead, Judge Haynes based his grants of immunity for each defendant solely upon his/her status, without regard to their alleged conspiracy.

For example, with regard to the three so-called "independent experts", Judge Haynes left unmentioned the Complaint allegations that the defendant psychologist admitted in deposition that "independent experts" Rogers and the Club were under the psychologist's control, and that Defendant Rogers was also on his payroll. Instead, Judge Haynes held that Ms. Rogers and The Club "were integral parts of Mr. McMillan's performance of his duties" and granted all three defendant "experts" immunity solely on the basis of their claimed status as independent appointed experts per *Kurzawa v. Mueller*, 732 F.2d 1456, (6th Cir. 1989).[8] Nor did Judge Haynes attempt any "functional analysis" of the extra-judicial acts which Petitioner had alleged were taken by the so-called independent experts outside the scope of their appointed authority.

For another example, no mention was made by Judge Haynes of Petitioner's allegations that the chancellor had set and manipulated a pair of hearings in Sept, 2001 in order to insert the missing mandatory evidence created by his chosen psychologist, *or* that the chancellor had been disqualified summarily by Tennessee because of his actions during the hearing wherein he inserted defendant Rogers' "findings" in her absence, *or* that the replacement judge found NO evidence to support the suspension of Petitioner's

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[8] See Appendix pg. 1.4 of the "Excerpted Transcript of Proceedings" of the sole hearing in the case on April 19th, 2002.

rights. However, Judge Haynes declined to make the declaratory judgment sought by Petitioner, (i.e., whether the chancellor's alleged acts in support of the conspiracy were judicial) because he was: "uncertain if entertaining a declaratory judgment action against the defendant Heldman would clarify or settle any legal relations in issue".[9]

As a final example, Judge Haynes did not mention Petitioner's factual allegations concerning defendant attorney Jackson's acts in support of the conspiracy, e.g., that he had suborned Ms. Chaffin's perjury on several specified issues, that he had colluded with defendant Chaffin and the psychologist to "fabricate" certain facts including certain pictorial evidence, and generally assisted defendant Chaffin to present what she characterized as a "completely inaccurate picture" of her case resulting in the wrongful suspension of Petitioner's parental rights. Jackson was awarded immunity from suit according to his status as a "private attorney" pursuant to *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509, (1981) while his alleged acts in support of the conspiracy were disregarded.[10]

But in his Final Order dated April 23, 2001, four days after the hearing wherein the case was dismissed, Judge Haynes felt led to mention for the first time the gravamen of Petitioner's case, i.e. the conspiracy of the defendants:

> "As to Plaintiff's conspiracy claim, the Court modifies its earlier bench ruling in open court, to reflect that Plaintiff's allegations of conspiracy among the defendants concern adversary proceedings before a state court judge in which the state court judge, the state appointed experts, the Plaintiff's wife and her counsel acted in concert to cause a ruling in Plaintiff's wife's favor. For Plaintiff's conspiracy claim, the Court adopts the ruling in Dolin v. West, 22

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[9] Please see Appendix pg. 1.7, "Excerpted Transcript..."

[10] Please see **Question No. 2**, *infra*, for further discussion.

F.Supp.2d 1343, 1351 (M.D.Fl. 1998) that these types of allegations are legally insufficient to state an actionable conspiracy claim." (Append. pg. 1.14.)

Although *Dolin* teaches that mere conclusory allegations are insufficient to state a claim of conspiracy, Judge Haynes did not attempt to explain how *Dolin* applies to complaints such as Petitioner's which set forth numerous, explicit, non-conclusory facts in support of a claimed conspiracy.

Referring again to Judge Haynes' "bench ruling" of April 19th, he stated therein that he was granting both the Defendants' Motion for Sanctions and their Rule 11 motion against Petitioner's counsel.[11]

No sanctions were ever awarded against Petitioner. But in his "bench ruling", Judge Haynes suggested to the defendants that should Petitioner appeal the dismissal of his case, they should file Section 1988 motions against Petitioner personally.[12] Carefully, regardless of the chill Petitioner felt as he contemplated exercising his appellate rights, he filed his timely "Motion to Alter or Amend the Judgment" of dismissal. It was denied.

In the reasonable belief that the factual allegations of his case should actually be addressed by a federal court before being dismissed with prejudice, Petitioner then filed his timely notice of appeal to the Sixth Circuit. Pursuant to the recommendation of Judge Haynes, the defendants moved for $90,000.00 in attorneys fees and costs against Petitioner personally, all of which were granted.[13]

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[11] Please see Appendix pg. 1.9 *et seq.*, "Excerpted Transcript..."

[12] Please see **Question 3**, Pg. 23, *infra*, for details.

[13] Please see **Question 3**, Pg. 23, *infra*, for details.

Disposition by the Sixth Circuit

The panel assigned the appeal[14] affirmed the judgment of the District Court without providing benefit of analysis of the merits, again leaving un-mentioned every factual allegation set forth in the Third Amended Complaint. Concerned, but intent to have a federal court address the actual facts set forth in his Complaint, Petitioner timely filed his "Motion for *Enbanc* Rehearing" with the Circuit, basing it solely upon Circuit precedent that: "[w]hen reviewing immunity defenses the district court or appellate court *de novo* **will** determine whether the facts alleged by Plaintiff, if proved, would overcome the asserted immunity defenses." *Spurlock v. Satterfield,* 167 F.3d 995, C.A.6 (Tenn.) 1999.

However, no justice of the Sixth Circuit moved for rehearing pursuant to Petitioner's motion. In response to the defendants' motions for another $49,000.00 in costs and fees, the circuit panel granted the defendants only a sum total of $4,400.00, setting forth the conclusion that Petitioner's appeal was "vexatious" but providing no record evidence as support for such finding.

Question No. 1

Should absolute immunity for witness testimony be extended to shield from civil liability defendant-witnesses jointly participating in alleged extra-judicial conspiracies to present false and incomplete testimony? [A split exists among Circuits.]

Introduction

Petitioner claims that his complaint states a claim for relief in light of the alleged "conspiracy", which created and manipulated false and incomplete evidence including testimony. For example, the three so-called "experts" were sued for alleged acts taken outside the scope of their

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[14] Jurisdiction of the Sixth Circuit was invoked per 28 U.S.C. Sec. 1291.

appointed authority in support of the conspiracy. Likewise, Defendant Chaffin was sued for certain specified acts committed off the witness stand in support of the conspiracy.

Petitioner respectfully contends that the defendants *are* liable under Section 1983, if only for their alleged non-testimonial acts in support of the claimed conspiracy. Had his case occurred in the Second or Seventh Circuits, which explicitly adopt the stance that testifying witnesses engaged in conspiracies to present false and incomplete testimony are not immunized from damages under Section 1983,[15] his *pro se* Third Amended Complaint, regardless of inartful pleading, arguably *would* have "stated a claim" against the witnesses. Accordingly, Petitioner suggests that three main reasons strongly support a grant of certiorari regarding this Question:

A. There is a Conflict among Circuits as to its resolution

B. Defining *Briscoe's* reach is as "important" as *Briscoe* itself

C. No "better" case will arise to decide the Question

A. Conflict among Circuits

There is a direct conflict between circuits whether to extend the absolute witness immunity set forth in *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed. 2d 96, to cases such as Petitioner's, which do not base claims solely upon testimony itself, but which allege *conspiracies* to present false and incomplete testimony.

In *San Filippo v. U.S. Trust Co.*, 737 F.2d at 255, the Second Circuit held:

> "[*Briscoe*] was expressly limited to immunity for testimony given in judicial proceedings, and its rationale – to encourage witnesses to come forward

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[15] *See San Filippo v. U.S. Trust Co.*, 737 F.2d 246 (2nd Cir.1984), *cert denied*, 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985), and *Angarone v. Ienco*, 286 F.3d 994 (7th Cir. 2002) *cert. denied*, 123 S.Ct. 581, 154 L.Ed.2d 442.

with all they know – does not justify extending that immunity to cover extra-judicial conspiracies...to give false testimony."

In *Dory v. Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994), the Second Circuit further explained:

"The holding in *San Filippo* is based on the crucial distinction between the presentation of perjurious testimony and a conspiracy to present perjurious testimony. With regard to witnesses, the distinction is important because witnesses enjoy immunity only for their actions in testifying, and are not immune for extra-judicial actions such as an alleged conspiracy to present false testimony.'

In the more recent case of *Angarone v. Ienco*, 286 F.3d 994, (7th Cir. 2002), *cert denied*, 123 S.Ct. 581, 154 L.Ed.2d 442, the Seventh Circuit held that in light of the allegations that police officer witnesses withheld exculpatory information and lied to federal prosecutors resulting in a successful indictment and prosecution, the officers lacked immunity because "no absolute testimonial immunity attaches to the officers outside of trial and they are proper defendants..."

The First Circuit hasn't spoken in the post-Briscoe debate....[but] one district court in Massachusetts recently followed the lead of the Second Circuit by holding that "witnesses may be sued under Section 1983 for the testimony they gave as part of a conspiracy consisting of their testimony and other non-testimonial acts" *Cignetti v. Healy*, 89 F.Supp.2d 106, 117 (D.Mass.2000) (Lasker, J.) The court in that case, however, rejected the plaintiff's claims because they were based merely upon "conclusory allegations" and "improbable inferences". id. at 118.

A court of the Fifth Circuit has also agreed with the holdings noted above. In *Foster v. City of Lake Jackson*, 813 F.Supp. 1262, (S.D.Tex.), 1993, reversed on other grounds, 28 F.3d 425, C.A.5 (Tex.), 1994, that court held:

"Plaintiffs assert that Briscoe applies only to claims

based solely on allegedly perjured testimony. By contrast, Plaintiff's assert, their claim is that the Defendants engaged in a conspiracy to deprive them of their constitutional rights of access to the courts by concealing and suppressing evidence and suborning perjury. In furtherance of this conspiracy, Defendants Houston and Yenne gave perjured deposition testimony. Thus Plaintiff's suit is not barred because they are not attempting to assert claims based solely on the perjured testimony of one or more defendants..."

However, holdings from the Sixth Circuit, from where this Petition springs, directly contradict those of the Circuits and courts mentioned above. "The doctrine enunciated in *Briscoe v. LaHue* also shields from liability alleged conspiracies to give false and incomplete testimony in judicial proceedings", *Alioto v. City of Shively, Ky,* 835 F.2d 1173, C.A.6 (Ky), 1987, citing *Macko v. Byron*, 760 F.2d 95, 97, (6th Cir. 1985).

Furthermore, other Circuits have rejected Section 1983 claims alleging that the defendants were not entitled to absolute immunity because they were engaged in a conspiracy with each other and that cases based on claimed conspiracies to falsely testify are mere attempts to circumvent or "short-circuit *Briscoe's* grant of absolute immunity to testifying witnesses" *Mitchell v. City of Boston,* 130 F.Supp.2d 201, citing *Franklin v. Terr*, 201 F.3d 1098, 1101-12 (9th Cir. 2000) (involving allegations of conspiracy between two testifying witnesses); *Hunt v. Bennett*, 17 F.3d 1263, 1267-68 (10th Cir.1994) (holding a prosecutor and police officer witness absolutely immune from claims they conspired to present false testimony); *Snelling v. Westhoff*, 972 F.2d 199, 200 (8th Cir.1992) (per curiam) (rejecting the conspiracy claim and pointing out that plaintiff's conspiracy allegations were merely 'conclusory'), *cert. denied*, 506 U.S. 1053, 113 S.Ct. 977, 122 L.Ed.2d 132 (1993); *McArdle v. Tronetti*, 961 F.2d 1083, 1085-86 (3rd Cir.1992) (involving testifying witnesses).

Legislative Intent behind "The Act of 1871"

In 1871, widespread outrages committed by the Ku Klux Klan and the ineffectiveness of state judicial protections necessitated the creation of an independent federal remedy. *Briscoe v. LaHue*, 460 U.S. at 338, S.Ct. 1108 at 1117.

Section 2 of the Ku Klux Klan Act of 1871 [now 42 U.S.C. Section 1985] providing liability for private conspiracies, is not applicable to Petitioner's case since his is not based on allegations of race or class-based "equal protection" violations, a mandatory element for Section 1985 suits. Petitioner contends Section 1 of the Act of 1871 [now 42 U.S.C. Section 1983] is the remedy provided by Congress for deprivations such as he has experienced, and that neither its legislative history, its wording or common law precedent limit it's reach against conspiracies such as that he faced. It reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable..."

Nothing in the legislative history of the Act could lead to a conclusion that Congress intended that "every person" who participates in conspiracies to present false and incomplete testimony then later testifies, is *ipso facto* immune from liability for their extra-judicial conspiracy. Such a holding would stand on its head both the language of the Act and the intent of its framers, i.e., that the Act, since remediative, should be interpreted "liberally" with the "largest latitude consistent with the words...to protect and defend and give remedies for their wrongs to all the people", *Briscoe*, 460 U.S. at 348, 103 S.Ct. at 349.

Such extension would also violate generally accepted

principals for interpreting laws: "Absent a clearly expressed legislative intention to the contrary, that language must be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051,2056, 64 L.Ed.2d 766 (1980). And although the *Briscoe* court cautioned that the words "every person" of Section 1983 must be read against the background of common law tort liability, e.g. *Pierson v. Ray*, 386 U.S. 547, 556-557, 87 S.Ct. 1213, 1218-1219, 18 L.Ed.2d 288 (1967), etc., the common law actually appears to have provided a specific remedy against *conspiracies* involving false testimony, such as that alleged by Petitioner:

"As early as 1293, various statutes were enacted to aid persons who had been falsely and maliciously indicted or accused of crimes by conspiracy among the defendants. In such cases a writ of conspiracy was employed in seeking redress". *Briscoe*, 460 U.S. at 351, 103 S.Ct. at 1124, dissent citing "M. Bigelow, Leading Cases on the Law of Torts 190-191 (1875); T. Street, The Foundations of Legal Liability 328-329 (1906); W. Holdsworth, A History of English Law, 366 (4th ed. 1936)".

Petitioner contends that his claim can and should be read to center upon the defendants' alleged conspiracy to present false and incomplete testimony. Thus it appears his civil claim could be liberally read as an attempt to privately prosecute a "writ of conspiracy", notwithstanding the absolute immunity extended at common law for the content of a witness' testimony.

In sum, Petitioner contends that neither the legislative history of the Act, its wording, or common law antecedent precludes suits against alleged co-conspirators, such as the defendants in this case, using the courts themselves to deprive claimants of federal rights.

Policy considerations

Briscoe sets forth the policy consideration that

individual witnesses need to avoid intimidation and self-censorship because the precise function of the judicial process is to

> "determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in cases are such that those involved in judicial proceedings should be 'given every encouragement to make a full disclosure of all pertinent information within their knowledge'".

Further, this court has often described litigation as a "search for truth". *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123.

But if conspirators are to be shielded from liability for their non-testimonial conspiracies to withhold information or provide false information to courts on the basis of the fact that at some point they may have testified, Petitioner contends that courts will be drained of their vitality, lawsuits will increasingly devolve into "more of a battle of deception than a search for truth". *Hickman v. Taylor*, 329 U.S.495, 67 S.Ct. 385, 91 L.Ed.451 (1947).

Finally, with regard to policy, in response to arguments that witnesses will be intimidated without protection from prospective false suits alleging a conspiracy, the Second Circuit cogently replies:

> "Nor do we find persuasive defendants' argument that absent the immunity they now seek, every witness could be intimidated by the prospect of defending a civil suit charging 'conspiracy' to give false testimony, just as easily as a suit charging false testimony. Insofar as witnesses may face groundless 'conspiracy' suits, ample protection against costly defense should ordinarily be provided by the possibility of 12(b)(6) dismissal or summary judgment in defendants' favor." *San Filippo v. U.S. Trust Company of New York*, Inc,737 F.2d at 255.

B. Defining *Briscoe's* extent is as important as *Briscoe* itself

The absolute witness immunity set forth in *Briscoe* was an important issue which claimed the attention of this Court. The need to define its contours is no less important.

Also suggesting the importance of this issue is the fact that numerous cases wherein it has been raised have percolated through the courts below, with contradictory resolution. In fact, less than one year ago this Court denied certiorari again on this issue, (See *Angarone vs. Ienco*, 123 S.Ct. 581, 154 L.Ed.2d 442), with the Seventh Circuit taking a position favoring Petitioner's. Clearly, this is a recurring question and it appears unlikely that the chasm between Circuits on the issue will be resolved without intervention by this Court.

Furthermore, it is obvious that resolution of the Question has far greater significance than to Petitioner's case alone. This Question concerns a tremendously important principle to those assaulted by state actors who have no personal regard as to the sanctity of the judicial process and conspire to undermine it. Although we may be loathe to admit it, chancellors and other state actors are every bit as susceptible to human foibles as we ourselves. To grant certiorari in this case will send a message that clever manipulation of the judicial process itself may have serious repercussions.

C. No "better" case will arise to decide this Question

Petitioner paid careful attention to the concerns of the District Court, which nearly eliminated his case by focusing exclusively on his former counsel's procedural errors. Petitioner responded to his former counsel's errors by filing his *pro se* Third Amended Complaint as corrective of the

defects which concerned the court[16] and the defendants. It is the only live version. Although prolix, it does not appear to be fatally so. In fact, the Third Amended Complaint goes to conspicuous lengths to relate explicit, non-conclusory factual allegations of acts committed by the defendants outside the witness box in support of the claimed conspiracy, in order to avoid a finding that it merely contained "conclusory allegations and improbable inferences". *Cignetti v. Healy*, 89 F.Supp.2d at 118.

But, regardless of how inartfully pled, the Third Amended Complaint should "only have been dismissed for failure to state a claim if it appear[ed] 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'". *Haynes v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Since, 1.), the well-pled facts of Petitioner's *pro se* Complaint must be taken as true at this preliminary stage, and since, 2.), they appear to state an egregious violation of his parental and due process rights by an alleged conspiracy directed by a state actor, and since, 3.), there is a clear conflict among the Circuits as to whether or not *Briscoe* immunity should be extended to shield witnesses who conspire with a state actor to present false and incomplete evidence as has been alleged in this case, and since 4.) this issue was squarely raised on appeal below, this cause would be ideal for establishing the extent of *Briscoe*, sanctioned errors by former counsel notwithstanding.

Petitioner carefully pleads again with the Court to note that he himself has not been sanctioned, and that no record facts appear to support the lower courts' award of costs and fees against him. (Please see **Question No. 3**, pg.

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[16] It was filed with the approval of the District Court after the attempted resignation by former counsel and *before* the only hearing in the case on April 19th, 2001. But it was "dismissed" without comment.

23, *infra*, for details.)

Question No. 2

Whether this Court should compel the lower courts to apply its holding in *Tower v. Glover,* (cite omitted), that otherwise private attorneys **are** liable in properly stated Section 1983 conspiracy cases?

A. Resolution below

With regard to the allegations against the defendant attorney Jackson, The Honorable District Judge Haynes held that: "Private attorneys have been held not to act under color of state law", citing *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509, (1981), and that Mr. Jackson was thus "not acting under color of state law". (See Appendix pg. 1.3, "Excerpted Transcript of bench ruling".) As noted above, the Circuit affirmed without comment, (See Appendix pg. 1.21, Circuit Order affirming dismissal, 2nd full paragraph).

B. Relevant Factual Allegations

Inter alia, Petitioner alleged that Defendant Jackson was absolutely essential to effect the unwarranted year-long suspension of Petitioner's federally-protected parental rights. For example, when Mr. Jackson first learned that Petitioner had tape-recorded Ms. Chaffin's allegations of Mr. Jackson's wrongdoing in the case, e.g., what *she* alleged was Mr. Jackson's "fabrication" of facts, "embellishment", etc., Petitioner contends the attorney had a clear duty to bring his client's possible false accusations against him to the full attention of the court for resolution. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123. Such ethical behavior would have arguably resulted in the bulk of Ms. Chaffin's horrific allegations *against Petitioner* from being relied upon any further; the suspension of his rights, based as it was almost solely upon her testimony, likely would have been

terminated.

Instead, Petitioner alleged Mr. Jackson responded to Ms. Chaffin's tape-recorded attacks by suborning her perjury, creating an affidavit wherein Mr. Jackson had Ms. Chaffin swear that everything she had been tape-recorded saying about *him* was "untrue", i.e., lies, while encouraging the Court to nevertheless continue relying fully upon every allegation she had made against Petitioner.

Petitioner has alleged that the defendant chancellor assisted Mr. Jackson to defuse Ms. Chaffin's allegations against her attorney by repeatedly preventing Petitioner's counsel from setting the tape-recordings for hearing.

C. Why the decision below was wrong

There is a well-known exception to this Court's holding in *Polk County v. Dodson*, 434 U.S. 312 at 324. In *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758, (1984), a case brought by a *pro se* litigant, this Court announced that:

> "Although appointed counsel in a state criminal prosecution does not act 'under color of state law' in the normal course of conducting the defense, an otherwise private person acts 'under color of state law' when engaged in a conspiracy with state officials to deprive another of federal rights. In this country the public defender's only 19th-century counterpart was a privately retained lawyer, and such a lawyer would not have enjoyed immunity from tort liability for intentional misconduct such as that allegedly involved here. Respondent's complaint adequately alleges conduct 'under color of state law' for purposes of Section 1983 **in view of the conspiracy allegations."**

Sixth Circuit holdings, e.g., *Cooper v. Parrish*, 203 F.3d 937, C.A. 6 (Tenn.), 2000, conform. There, the Circuit states:

"If a party, [referring to the private attorney in Cooper] has conspired with [a] state official to violate constitutional rights, then that party qualifies as a state actor and may be held liable pursuant to Section 1983. A party who is not a public official may be liable to 42 Section 1983 and yet not be entitled to qualified immunity because, if not a public official, the reason for affording qualified immunity does not exist."

Since Petitioner's Third Amended complaint sets forth specific acts alleged to have been committed by the defendant attorney in support of a tacit[17] conspiracy involving a state actor resulting in the unlawful suspension of Petitioner's federally-protected rights, there appears to be a direct conflict between the decision of the district court and binding Supreme Court and Sixth Circuit precedent.

Accordingly, Petitioner contends that his Complaint does in fact "state a claim" against the attorney and that the decisions of the lower courts constitute a "departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction".

D. *Why should the Court grant certiorari regarding this issue?*

This Court's holding in *Tower v. Glover* is not merely

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[17] It may be worth noting that in the Sixth Circuit: "Express agreement among all conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all the details of an illegal plan or all of the participants involved, in order to find a 'civil conspiracy'... All that must be shown to prove civil conspiracy is that there was a single plan, that alleged co-conspirators shared in the conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Collyer v. Darling*, 98 F.3d 211 C.A.6 (Ohio) 1996. Pursuant to *Collyer*, Petitioner contended in his complaints that the "tacit", or unspoken, plan of the defendants was to suspend his parental rights without cause, using false and incomplete testimony. But the plan violated his rights.

persuasive, it appears to be absolutely binding upon the lower courts. However, should the lower courts be allowed to simply ignore this Court's decision in *Tower*, it not only mocks the principals of *stare decisis*, it could also result in the tacit elimination of civil actions as remedies in cases involving defendant attorneys.

Petitioner respectfully contends that the various states have enacted ethical codes for attorneys because principles of equitable conduct are simply not self-apparent nor mutually held. Standards have been set to prevent attorneys from taking unfair or unjust advantage in the virtual combat of the court. Undeniably, the standards of ethical behavior of any profession must sometimes, unfortunately, be effectively forced upon those unwilling or unable to police themselves.

But what remedy is available to private citizens for violations committed by the unscrupulous attorney? Filing "grievances" with a state bar can never provide **restitution** for damages resulting from unjust courtroom manipulations, such as those from which Petitioner claims to have suffered. The only true remedy held by the private citizen for reinforcing his rights is a civil action. And although this Court is not charged with setting or enforcing ethical standards for the bar at large, it has power to ensure the viability of the civil action to defend and recover from unconscionable wrongs committed by any profession.

Petitioner contends public policy fairly cries out for the protection of this civil action. The Question raised transcends Petitioner's case. If the bar is made aware, by the Court's granting of certiorari on this Question, that well-pled, non-conclusory allegations of conspiratorial conduct resulting in violation of federal rights "states a claim" and will be fully examined, it can only have a wholesome effect on the administration of justice.

On the contrary, if federal trial courts are allowed to simply dismiss cases of federal civil rights violations involving allegedly conspiring attorneys, the expressed intent of this Court in *Tower v. Glover* will be thwarted and the remedy of

a civil action against conspiring attorneys will have been tacitly nullified.

This Question does **not** raise an issue of the misapplication of well-settled law to familiar facts. It raises the issue of whether or not this Court will use its supervisory jurisdiction to protect both its *own* precedent and the remedy of a civil action. Petitioner respectfully contends this Court has the power and undeniable duty to summarily compel the lower courts to apply *Tower* to the well-pled allegations of his case.

Question No. 3

> Whether this Court should set forth rules governing the articulation of factual findings when Section 1988 awards are made?

A. Relevant Facts

At the conclusion of Judge Haynes' bench ruling after the only hearing in the case on April 19th, 2002, he recommended to the defendants that they should file motions for fees and costs against Petitioner should he appeal the dismissal:

> "In considering the appropriate remedy in this case, the Court will reserve for the moment any award of attorney's fees under 42 Section 1988 because the plaintiff is now proceeding *pro se* and I think if they are going to pursue it, I think you all should file your motion under 42 USC 1988 or whichever motion basis you're relying upon. So I'm going to reserve that."[18]

Judge Haynes concluded his bench ruling on April 19th, 2002 by awarding attorneys fees and costs against Petitioner's *counsel* resulting from the Rule 11 motion and Joint Motion to Show Cause by the Defendants. The award

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[18] "Excerpted Transcript of Hearing", Appendix pg.1.11

against Petitioner's *attorney* totaled $6,600, per the Court's order entered July 3, (App. Pg. 1.16). Petitioner was *not* sanctioned in any way.

Giving careful thought to the verbal warning by Judge Haynes to forego appeal or face Section 1988 awards, but cautiously confident in the merit of his conspiracy claims, Petitioner first filed his motion to proceed *pro* se on April 24th, 2002. It was granted by Judge Haynes on April 25th. [Please bear that date in mind. Its significance will be seen later.] Subsequently, Petitioner filed his "Motion to Alter or Amend the Judgment", which was denied.

Petitioner appealed to the Circuit. In response, the defendants filed motions for costs and fees as Judge Haynes had recommended. Just as he had intimated, Judge Haynes awarded the defendants $90,000 dollars against Petitioner personally. [This was unrelated to the $6,600.00 award made by the Court against Petitioner's former counsel on April 19th.] In his "Memorandum" dated and entered July 3, 2002, Judge Haynes set forth the record facts supposedly justifying the $90,000 award. It consists of five conclusionary sentences. (Append. Pg. 1.21, 2nd full paragraph).

On appeal, the Circuit panel, in similar manner as the District Court, made no analysis of any facts alleged in the Third Amended Complaint nor their impact upon the immunities claimed by the defendants. The panel simply affirmed "the district court's judgment for the reasons stated in the record on April 19th, 2002, and in the district court's order entered April 23, 2002." (Appen. Pg. 1.25, 1st para.)

Further, without reference to any portion of the record, other than an oblique reference to documents *by Petitioner's former counsel* for which that *counsel* ALONE had been sanctioned by the District Court on April 19th, the panel simply held that "[T]he record supports defendants' contention that this litigation is vexatious", (App. pg. 25) and granted $4,400.00 in additional fees and costs to the defendants, even though they actually requested $49,000.00.

B. Relevant Law

"Fee shifting", or the awarding of attorneys fees and costs appears to be highly unusual. In fact, "we start with the premise that under the American Rule, absent statutory authorization or an established contrary exception, each party bears its own attorneys' fees." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141, (1975). "The principal exception to this rule is a district court's inherent authority to award fees when a party litigates 'in bad faith, vexatiously, wantonly, or for oppressive reasons'". *Alyeska Pipeline*, 421 U.S. at 247, 95 S.Ct at 1616.

In order to award attorneys fees under this bad faith exception, a district court must find that "the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment". *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). "Plaintiff's action must be 'meritless' in the sense that is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163(1980).

C. Why the judgments of the lower courts is wrong

It thus appears that three key findings are necessary to support fee shifting: 1.) a case must have no arguable merit, 2.) a Plaintiff or his counsel must have *known* his case lacked merit *upon initiation*, and 3.) it was filed for harassment or other improper motive.

Petitioner contends that the five (5) sentences of the Court's "Memorandum", (App. pg. 1.21, 2nd full paragraph) filed July 3, 2002, which purport to set forth the entire findings upon which Judge Haynes based his grant of fees to the defendants, are not only unsupported by record references, two of the five sentences appear to be directly contradicted by the record. For example, the fourth of the

five sentences by Judge Haynes states:

> "The Plaintiff continues to engage in making impertinent and scandalous allegations against the defendants, notwithstanding the express warning of the Magistrate Judge not to do so." (App. pg. 1.21)

Petitioner contends that said conclusion is apparently directly contradicted by the record. As noted above, it was Petitioner's *counsel* **alone** that the Court sanctioned on April 19th, 2002 for his alleged impertinent and scandalous written allegations against defendants McMillan and Chaffin. When Judge Haynes sanctioned Petitioner's counsel on April 19th, 2002, Petitioner contends that the sanction imposed should have fully assuaged the offended dignity of the court for ANY alleged wrongdoing before that date.

In no document created by Petitioner without assistance of counsel, [he has been effectively proceeding *pro se* since the irregular, attempted withdrawal of his counsel in *mid-March, 2002*], is there a single impertinent or scandalous allegation upon which Judge Haynes could base such conclusion in his Memorandum on July 3, 2002.

Petitioner also contends that the fifth of the five conclusory sentences in Judge Haynes' **July 3, 2002** "Memorandum" supporting his award, appears to also be contradicted by the record:

> "Yet, Plaintiff and his counsel persist in making slanderous remarks about the parties and their counsel as well as about the Magistrate Judge".(Append.pg.1.21)

The record shows that Petitioner's counsel, Mark C. Lane, filed his Motion to Withdraw as counsel on March 14th, 2002. [Docket entry 85.] No notice of his intent to withdraw was provided to Petitioner and Mr. Lane never communicated with Petitioner after that filing. Counsel's motion to withdraw was denied by Judge Haynes on March 15th, 2002. [Docket Entry 88.] Due to this Order denying withdrawal, at the hearing on April 19th, 2002, Petitioner and his case was unrepresented, although Mr. Lane did procure

counsel to represent himself and billed Petitioner for the cost. But the merits of the case and Petitioner himself were unrepresented in the only hearing of the case, on April 19th, 2002, except by his own unskilled efforts against the combined efforts of numerous attorneys. The results were predictable.

Since Petitioner himself has never been sanctioned for any document he has produced, and since he has officially had no counsel of record since Judge Haynes granted Petitioner's motion to proceed *pro se* on April 25th, 2002, the court's July 3, 2002 statement that fees and costs were awarded because Petitioner and counsel were supposedly persisting in jointly slandering people after the April 19th hearing, is contrary to the facts of the record.

As a general observation, Petitioner contends that award of $90,000 against him is also unjust because the Court is holding *Petitioner* solely liable for filing the case, while his former counsel, who advised the filing of the case and prosecuted it, was **not** held liable in any manner for its supposed meritless creation and prosecution. Stated in its obverse, if the case was truly "vexatious" and without merit *ab initio* to the extent that fees were shifted, why was not the attorney responsible for filing such a frivolous case held accountable?

Respectfully, Petitioner contends that the lawsuit is actually meritorious, though poorly managed, and that the award of fees against him was granted, in truth, solely because he had the temerity and persistence to appeal what appears to be the complete disregard of the allegations of his case.

D. Why should the Court grant certiorari on this Question?

The record shows that the apparently wrongful award of fees by the District Court was squarely raised on appeal to the Circuit, which, for unspoken reasons, declined to address the issue. However, this Court has supervisory charge of the

lower courts, regardless of the lack of discussion generated below.

The record also shows that the attorney who filed the case was sanctioned a total of $6,600 for his errors, but the $90,000 cost for filing a supposedly "meritless" lawsuit has been charged solely to his lay client, Your Petitioner. Furthermore, the award appears to be based on five (5) unsupported conclusions, some of which appear to be directly contradicted by the record. Petitioner contends that awards on such questionable basis should be of grave significance to the Court.

This Court has long ago decided what constitutes an acceptable basis for the award of attorneys fees. But Petitioner contends that there appears to be a striking need for the Court to set forth a formula for recitation of specific record facts even perhaps allowing a response, (similar to a show cause), in order to prevent unjust fee shifting.

The grant of certiorari on this issue to accomplish that end will be immensely beneficial and significant to litigants and practitioners nationwide, far beyond those connected with this litigation.

Petitioner contends the award of $90,000.00 in fees and costs to the defendants by the District Court constitutes clear abuse of discretion. Further, since a.) the record appears to show that the Circuit failed to address any issues raised on appeal, and b.) the issues raised on appeal appear to have arguable merit and c.) it appears there is no record evidence to support the finding by the Circuit that Petitioner's careful prosecution of his appeal is in any way "vexatious", Petitioner contends the Circuit's award of an additional $4,400.00 in fees and costs to the defendant attorneys is also a clear abuse of discretion and should be summarily reversed.

Petition Conclusion:

In Re: **Question No. 1**

Petitioner requests the Court grant certiorari to determine the correct answer to this repeatedly-raised, important Question.

In Re: **Question No. 2**

Petitioner requests this Court grant certiorari to protect both its own precedent and civil actions against conspiring attorneys, summarily vacate the lower courts' decisions, then remand the case against the defendant attorney to determine whether or not his alleged acts state a claim pursuant to *Tower v. Glover*.

In Re: **Question No. 3**

In light of the apparent abuse of discretion by the lower courts when awarding attorneys fees and costs, Petitioner requests the Court grant certiorari, summarily vacate the awards to the defendants, then set forth specific guidelines governing articulation of precise record facts by trial courts when "meritless" cases supposedly justify "fee shifting".

Appendix

Defendant Chancellor Heldman has been reversed and dismissed from other cases besides Petitioner's by the Tennesee Court of Appeals, which has noted the judge's

> "Repeated misapplication of fundamental, rudimentary legal principles in ways that favored one litigant substantively and procedurally", including, *inter alia*, "the total lack of merit to the arbitrary action of the trial court...".See *Hoalcraft v. Smithson*, 2001 WL 775602, (Tenn.Ct.App.).

The Tennessee Court of Appeals again dismissed him in *Earls v. Earls*, 2001, WL 504905, holding that:

> "It is not [Chancellor Heldman's] disagreement with our decision in this case that is remarkable. Rather it is [his] unprecedented actions of (1) refusing to implement a higher court's decision which has become the law of the case, (2) undertaking to review the correctness of a higher court's decision which has become the law of the case, (3) determining that the higher court's decision is erroneous, and in effect attempting to overrule it, even though the only court with jurisdiction to do that has declined, and (4) **becoming an advocate for the position of one of the parties to the litigation**."

United States District Court
Middle District of Tennessee
Nashville Division

No. 3:01-1480

Marcus C. Ellis,
Plaintiff

v.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, "The Exchange Club",
Defendants

"Excerpted Transcript of Proceedings"
of the sole hearing in the case,
held on April 19, 2002

The Court:

I'm going to direct that the court reporter prepare a transcript of what I'm about to say. And the Court is going to reserve the right to revisit that to make any appropriate corrections or modifications.

Plaintiff Marcus C. Ellis filed this action under 42 USC Section 1983 against the defendant Russell Heldman, Chancellor of the Williamson and Perry County Chancery Court; Robert Todd Jackson, a Tennessee attorney; Candi Noelle Chaffin, the plaintiff's former spouse; David W. McMillan, a psychologist; Frances Rogers, who works with the defendant McMillan; and the Exchange Club, which is a not-for-profit organization that was utilized under an order of Judge Heldman.

The Plaintiff's original complaint sought injunctive relief against the defendant Heldman and damages against the other individual defendants. The plaintiff has filed a

series of amended complaints and the Court has considered all of his complaints, including the Third Amended Complaint that the plaintiff filed pro se.

The Court notes in this regard that the Third Amended Complaint does not seek injunctive relief against the defendant Heldman, who, by order of the state appellate court, is no longer presiding over the plaintiff's state court proceeding. The plaintiff in this case asserted claims that his First Amendment right of association as a parent was violated as well as his rights to procedural and substantive due process under the Fourteenth Amendment.

The plaintiff's claims arise out of a domestic relations proceedings in the state court. The plaintiff has made a series of allegations that the defendants Jackson, Chaffin, McMillan, and Rogers made or participated or procured the making of perjured testimony in the state court that was relied upon by the defendant Heldman in making certain rulings in the case.

In an action brought under 42 USC Section 1983, particularly where one is seeking damages, there are several requirements. The first requirement is that each defendant must be acting under color of state law. Second, the defendants must violate a specific due process right. And third, the defendants must not be immune from the relief sought. Where damages are sought, there must be a clearly established right at the time the offense occurred.

As to the first factor, as to whether the defendant acted under color of state law, the defendant Heldman clearly did act under color of state law by reason of his actions as a state chancellor.

As to the other defendants, the Court notes that the defendant Robert Jackson was an attorney for the wife in the state court proceeding. Private attorneys have been held not to act under color of state law under *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981).

The Court finds in this instance that under the

allegations of this complaint the defendant Robert Jackson as the attorney for one of the parties in the divorce action was not acting under color of state law.

The defendant Candi Noelle Chaffin is the plaintiff's ex-wife, and the Court likewise observes she did not act under color of state law but was a party and a witness in the state court proceedings.

The Exchange Club is a private not-for-profit organization, and the Court finds that the Exchange Club did not operate under color of state law.

The Court finds that the defendant Frances Rogers, who is a member, a representative of the Exchange Club, and worked with Dr. McMillan, is a private person and did not act under color of state law.

The defendant David McMillan, likewise, is not shown to be a state official and did not act under color of state law.

To be sure, the defendants McMillan, Rogers and the Exchange Club did act under the authority of orders issued by Defendant Heldman. Concerning issues before Judge Heldman, the defendant McMillan was a court-appointed expert.

To the extent that the defendants McMillan, Rogers and the Exchange Club acted pursuant to the order of Judge Heldman, who appointed an expert to provide information to the Court, the Court finds that these defendant are entitled to quasi-judicial immunity. Under *Kurzawa v. Mueller,* 732 F.2d 1456, 1458, (6th. Cir. 1984), the Sixth Circuit ruled that government investigators, psychiatrists, and guardian ad litems who were part of an administrative prosecution of a child abuse case were immune from damages, stating that witnesses and other persons who were integral parts of a judicial process were entitled to absolute immunity.

Here the defendant McMillan was appointed by Judge Heldman as a court appointed expert. Judge

Heldman required of Mr. McMillan to make reports to him. The defendant Rogers and Exchange Club were integral parts of Mr. McMillan's performance of his duties.

For that reason, the Court concludes that the defendants McMillan, Rogers and the Exchange Club, to the extent they acted pursuant to an order of Judge Heldman, acted under color of state law, but are entitled to immunity.

Moreover, to the extent that there is a claim against the defendant Chaffin as a witness in a state court proceeding, the Court notes in *Briscoe v. LaHue,* 460 U.S. 325 (1983) the Supreme Court awarded absolute immunity to police officers who likewise had allegedly falsely testified in a judicial proceeding. And the Supreme Court ruled as follows:

"In short, the common law provided absolute immunity from subsequent damages liability for all persons, governmental or otherwise, who were integral parts of the judicial process. It is equally clear that Section 1983 does not authorize a damages claim against private witnesses on the one hand or against judges or prosecutors in the performance of their respective duties on the other.

"When a police office appears as a witness, he may reasonably be viewed as like other witnesses sworn to tell the truth, in which event he can make a strong claim to witness immunity. Alternatively, he may be viewed as an official performing a critical role in the judicial process afforded other participants in the same proceeding."

To the extent that there is an arguable claim against the defendant Chaffin concerning her providing testimony in the state court, she is entitled to witness immunity.

Now, as to the defendant Russell Heldman, originally the plaintiff sought injunctive relief, which the plaintiff no longer pursues, but rather asserts that he now only seeks declaratory relief. The Court notes that Judge Heldman has been removed and that certain prior orders of his have been vacated. The Court notes that there are state appellate

remedies available to the plaintiff. Where there are state courts who hear claims, including constitutional claims, this Court is not required to entertain Section 1983 claims. *Hayes v. Wedgington*, 110 F.3d 18, 20 (6th Cir. 1997).

To the extent that the plaintiff seeks declaratory judgment relief, it is a discretionary remedy of the court. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) a *per curiam* opinion. The fact that there is a factual dispute in a declaratory judgment action does not preclude the Court's exercise of its discretion to entertain the action. *Aetna Life Insurance Company v. Etworth*, 300 U.S. 227, 242 (1937).

The Sixth Circuit has stated, likewise , that whether to entertain a declaratory judgment action is discretionary for the District Court. The Sixth Circuit has stated that the following matters should be considered by the court in deciding whether to entertain a declaratory action. Among these factors are: whether the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and, two, whether the action will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. *Allstate Insurance Company v. Green*, 825 F.3d 1061, 1063 (1987).

The Court of Appeals refined these two basis contentions to pose the following questions: whether the declaratory judgment action would settle the controversy; two, whether it would serve a useful purpose in clarifying the legal relations at issue; third, whether declaratory remedy is being used merely for the purpose for procedural fencing, or to provide an arena for res judicata; four, whether use of the declaratory action would increase friction between our federal and state courts and would improperly encroach on state jurisdiction; and five, whether there is an alternative remedy which is better or more effective.

In considering this matter, the Court notes that there

are several significant state interests. The state courts have an interest, of course, in regulating the conduct of state judges. The state courts also have a significant interest in regulating divorce proceedings.

In considering the factors required by the Sixth Circuit, this Court is uncertain if entertaining a declaratory judgment action in this case against the defendant Heldman would clarify or settle any legal relations in issue. All of the divorce proceedings will be before another judge, and several of the orders of Judge Heldman have been set aside.

Also, the Court cannot determine whether entertaining a declaratory judgment action will terminate or afford relief from uncertainty, insecurity or controversy. Whatever the Court decides about the defendant Heldman, there remains a divorce proceeding before the Williamson County Court. And those judges will decide what, if any, rights the plaintiff has in connection with the visitation or custody of his child.

To entertain the declaratory judgment action against the defendant Heldman now while there is an ongoing state court proceeding seems to the Court to create unnecessary friction between federal and state courts.

As to whether there is an alternative remedy, there is, always, the appeal process in the state courts to review any action of a state court judge. The Court notes that several of the rulings about which the plaintiff complains concerning the defendant Heldman occurred in the context of his exercise of state court jurisdiction. Whether he acted properly, and whether he followed all of the appropriate rules or not, those are matters that can be fully handled on appeal in the state courts, including any federal procedural or substantive due process of First Amendment due process claims that the plaintiff asserts were violated by reason of what the defendant Heldman did.

With the availability of the state appellate remedy and the state court's willingness to consider federal

constitutional claims on appeal, the Court concludes that there is an alternative remedy available to the defendants.

The defendants have argued for abstention, and the Court has likewise considered that under *Kim v. Hite*, 44 F.3d 415, 419 (6th, Cir. 1995). The factors to be considered on abstention are the following: Whether there is a pending state court proceeding; whether the state court can afford relief; and whether the state court proceeding involves important state interests, many of the factors I have considered on the declaratory judgment issue.

Here there has obviously been an ongoing state court proceeding involving the plaintiff and the issues he raises concerning the custody of his child. Second, the state court can afford relief in terms of remedying the issues concerning child custody and child visitation. And, of course, the state court proceeding involves important state interests; that is regulating the conduct of state trial judges and regulating divorce proceedings between the parties.

While the plaintiff has attempted in his Third Amended Complaint to fashion this as solely a declaratory judgment remedy, the Supreme Court I believe has recognized that the federal court's consideration of declaratory relief can be equally intrusive as the pursuit of the injunctive relief.

In *Samuel v. Mack*, 401 U.S. 66 (1971), particularly at pages 73 and 74, the Supreme Court held, in the context of the state criminal prosecution, that the same equitable principle relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be permissible under these principles declaratory relief should ordinarily be denied as well.

To enter a declaratory relief on matters that may be before a state court, to me, would have the same interfering

effect as would an injunction. These matters are now before a new state trial judge, and the matters previously argued and presented can be presented to that state court.

For all of those collective reasons, the Court is going to dismiss this action....

The Court is now going to take up the defendant's motions for sanctions against the defendant and/or his counsel. In this connection, the Court notes that the plaintiff has represented that prior to April of 2002 that he did not prepare any of the papers that were filed with the Court.

The defendants' Rule 11 motion gave rise to several contentions. First, that papers were being filed in this action that were not signed by plaintiff's counsel. Second, that the plaintiffs, in various papers, has been utilizing the state criminal process in a way to obtain leverage in a civil action. Third, there were statements made in various court papers that were made without reasonable inquiry, or a factual basis, or were made for harassment, or to be vexatious.

Under Rule 11, the Court is required to consider whether a paper signed by an attorney, in this instance, was reasonable under the circumstances and whether the paper was founded, well grounded in fact. And the Court relies upon *Business Guides, Inc. v. Chromatic Communication,* 111 Supreme Court 922 (1991), as well as relevant Sixth Circuit authorities.

Now, the Court recognizes that since the decision in *Business Guides* that the provisions of Rule 11 have been amended to include many provisions, including a safe harbor provision that requires the party asserting a Rule 11 violation to give prior notice to the offending party before filing a motion.

Now with respect to the signing of the documents, the Court believes that Rule 11(a) and Rule 11(b) are clear in this regard, that papers filed with the court in connection with litigation must be signed by an attorney or an unrepresented party. And the purpose of that signature by

an attorney is to assure that, after reasonable inquiry, the paper contains matters that have a factual basis and that there is a reasonable basis for asserting the matter.

The Court finds that at least six documents filed with this court were not signed by the plaintiff's counsel, which is not disputed. Given the fact that these omissions were not cured after it was brought to plaintiff's counsel's attention the Court concludes that those omissions violate Rule 11.

With respect to making references to the state criminal process, the Court notes that there are factual disputes about certain statements made by the Plaintiff's counsel to the Assistant District Attorney as well as to a police detective, and the Court is not going to resolve those factual disputes.

The Court, however, will address that in connection with certain other statements that were made by plaintiff's counsel. In docket entry number 65, the plaintiff's counsel made a statement in this court concerning a judge of this court at page two that Judge Brown was biased in his rulings because of his association with the defendant or their counsel.

The Court has heard argument on that. The Court finds that there is not a factual basis for that statement. The Court finds that there was no reasonable inquiry made prior to the assertion of the statement, and that statement was a violation of Rule 11.

In docket entry number 72, plaintiff's counsel made certain statements about defendant Chaffin's family members. The Court finds that, in consideration of all of the circumstances, that those statements had no legitimate basis to the claims before the Court, had no legitimate basis as to the background of the divorce proceedings, and the Court finds those statements were inappropriate.

Third, in docket entry number 79, more particularly at page five, the plaintiff's counsel made references to state

court findings of probable cause that the defendant McMilan had committed a criminal offense for which there is no factual basis. The document upon which he relies would not support that assertion, and the Court finds that the conduct of the plaintiff's counsel in making such a statement violated Rule 11.

There are additional statements, docket entry number 93 at pages two and three and docket entry number 96 concerning other statements. The Court is not going to take those up.

The Court finds that, with the matters on which the Court found Rule 11 violations, that there was not an objective reasonable inquiry as to the basis for the statement that were made. In considering the appropriate remedy in this case, the Court will reserve for the moment any award of attorneys fees under 42 USC Section 1988 because the plaintiff is now proceeding pro se, and I think if they are going to pursue it, I think you should file your motion under 42 USC 1988 or whichever motion basis you're relying upon. So I'm going to reserve that.

With respect to the Rule 11 violations, however, its up to the Court to make an appropriate remedy in this case. And the Court believes that an appropriate remedy in this case is, first to require the plaintiff's counsel, Mr. Mark C. Lane, to attend 12 hours of continuing legal education on federal practice and procedure, and more particularly seminars involving Rule 11 and the requirements of Rule 11 in federal court litigation. Mr. Lane is to do that over the period of the next year and to provide a certification with the Court that he has performed that obligation.

The Court is also going to require that Mr. Lane write a letter of apology to Mr. McMillan for the allegations made in docket entry number 79, pages five and six.

I will, however, award attorney's fees to the defendants for time expended in the preparation of their Rule 11 motion and filing any responses thereto. And those

attorneys fees will be awarded against Mr. Lane.

In making its rulings on Rule 11, the Court has considered Sixth Circuit precedent, including but not limited to *In re: Rubin*, 825 F.2d 977, (6th Cir. 1987); *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370 (6th Cir. 1987). Although those decisions predate the 1992 amendments, they continue to be cited approvingly in the Sixth Circuit concerning general principles applicable to Rule 11.

Are there any other matters? The Court will enter an order consistent with its ruling. But as I said earlier, I'm going to reserve the right to modify my remarks.

United States District Court
Middle District of Tennessee
Nashville Division

No. 3:01-1480

Marcus C. Ellis,
Plaintiff

v.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, "The Exchange Club",
Defendants

"Final" Order of the District Court
entered April 23, 2002

In accordance with the transcript of the Court's ruling, as revised, and a review of the record, it is hereby ordered that:

- Defendant Robert Todd Jackson's motion to dismiss and/or for summary judgment is granted;
- Defendant Russell Heldman's motion to dismiss is granted;
- Plaintiff Ellis' motion for leave to file second amended complaint is denied as moot;
- Defendant McMillan's motion to dismiss is granted;
- Defendant Rogers' and the Exchange Club's motion to dismiss is granted;
- Defendant Heldman's motion to strike Plaintiff's notice of conflict of interest is denied as moot;
- Plaintiff Ellis' motion to provide grounds for recusal of Magistrate Judge and motion to strike are denied as moot;
- Plaintiff Ellis' motion to compel response by the

Defendant is denied as moot;

- Defendant Candi Noelle Chaffin's motion to dismiss is granted;

- Defendant McMillan's motion for Rule 11 sanctions is granted;

- Defendant Jackson's motion for Rule 11 sanctions is granted;

- Defendant Heldman's motion to compel Plaintiff to comply with FRCp 5 is denied as moot;

- Plaintiff Ellis' motion for leave to file response to motions for sanctions and joint motion to show cause order and third amended complaint is denied as moot, except as to the motion to file a third amended complaint that is granted, but is dismissed;

- Plaintiff Ellis' motion to compel Derek Smith to appear at show cause hearing is denied as moot

- Plaintiff Ellis' motion for Rule 28 deviation is denied as moot;

- Plaintiff Ellis' motion for an in camera hearing is denied as moot;

- Defendants Ronald L. Davis' and Derek Smith's motion for protective order is denied as moot;

- Plaintiff Ellis' motion for summary judgment is denied as moot.

As to Plaintiff's conspiracy claim, the Court modifies its earlier bench ruling in open court, to reflect that Plaintiff's allegations of conspiracy among the defendants concern adversary proceedings before a state court judge in which the state court judge, the state appointed experts, the Plaintiff's wife and her counsel acted in concert to cause a ruling in Plaintiff's wife's favor. For Plaintiff's conspiracy claim, the Court adopts the ruling in Dolin v. West, 22 F.Supp.2d 1343, 1351 (M.D.Fl. 1998) that these types of allegations are legally insufficient to state an actionable conspiracy claim.

As to the Court's granting of the Defendant's motion for Rule 11 sanctions, the Court hereby orders Plaintiff's counsel Mark Lane to complete twelve (12) hours of continuing legal education on federal practice and procedure, including seminars related to Fed.R.Civ.P. 11. Mr. Lane shall complete this continuing legal eduction within the next year and provide to the Court certification that reflects that Mr. Lane has performed these requirements. Mr. Lane is further ordered to write a letter of apology to Davide W. McMillan for allegations on pages five and six of Docket Entry No. 79 and to Defendant Candi Noelle Chaffin for his remarks about her family members.

In addition, Mr. Lane is ordered to pay attorney's fees and costs to the defendants David W. McMillan, Robert Todd Jackson and Candi Noelle Chaffin for the time expended in the preparation of their Rule 11 and show cause motions and the filing of any responses thereto. Claims for attorney's fees shall be made in compliance with Local Rule 13.

This action is dismissed with prejudice. This Order constitutes the **final order** in this action.

United States District Court
Middle District of Tennessee
Nashville Division

No. 3:01-1480

Marcus C. Ellis,
Plaintiff

v.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, "The Exchange Club",
Defendants

Order of the District Court

entered July 3rd, 2002, granting fees and costs to the defendants"

"In accordance with the Memorandum filed herewith, the Plaintiff's motion to take evidentiary depositions is denied.

The Defendants' motions for awards of attorneys fees (Docket Entry Nos. 136, 139, 144, and 146) are granted. Accordingly, the Defendants the Exchange Club and Frances Rogers are awarded attorney fees in the in the amount of $35,654.50 and expenses in the amount of $1,172.03. See Docket Entry No. 138. The Defendant David McMillan is awarded attorney fees in the amount of $13,257.00 as well as attorney fees in the amount of $3,642.00 for filing the motion to show cause, but those latter fees are assessed against Mark Lane, Plaintiff's former counsel. See Docket Entry Nos. 141 and 143. The Defendant Jackson is awarded attorney fees in the amount of $34,306.25 and expenses in the amount of $595.64. See docket entry no. 145. The defendant Candy Noelle Chaffin

is awarded attorney fees in the amount of $9,375.00 of which $3,000.00 is assessed against Mark Lane, Plaintiff's former counsel, in connection with the motion to show cause. The defendant Candi Noelle Chaffin's motion for entry of judgment of award of attorney fees, (docket entry no. 166) is denied as moot.

It is so ordered. Entered this the 3rd day of July, 2002.

United States District Court
Middle District of Tennessee
Nashville Division

No. 3:01-1480

Marcus C. Ellis,
Plaintiff

v.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, "The Exchange Club",
Defendants

"Memorandum" of the District Court
entered July 3, 2002, in support of Order granting fees and costs to defendants

"Plaintiff, Marcus Ellis, filed this action under 42 USC Section 1983 against the defendants Russell Heldman, Chancellor of the Williamson and Perry County Chancery Courts, Robert Todd Jackson, a Tennessee attorney, Candi Noelle Chaffin, the Plaintiff's former spouse; David W. McMillan, a psychologist; Francis Rogers, an employee of McMillan; and the Exchange Club, a not-for-profit organization that was utilized under an order of Judge Heldman. The gravamen of Plaintiff's claims is that the Defendants conspired to violate his First Amendment right of association as well as his procedural and substantive due process rights under the Fourteenth Amendment.

Plaintiff's original complaint sought injunctive relief against the defendant Heldman and damages against the other individual defendants. Plaintiff then filed a series of amended complaints. The Court has considered all of his complaints, including his Third Amended Complaint that

the Plaintiff filed *pro se*. In this regard, the Court notes that the Third Amended Complaint does not seek injunctive relief against the defendant Heldman, who by order of the Tennessee Court of Appeals, is no longer presiding over the Plaintiff's state court proceeding.

At the conclusion of oral argument on the then pending motions to dismiss, the Court issued a bench memorandum dismissing the action on several grounds. (Docket Entry No. 125). The Court also concluded that an award of attorney fees to the Defendants would be appropriate, including attorneys fees for the filing and argument on the Defendants' motion for a show cause hearing that was granted. *Id.* See also Docket Entry Nos. 82 and 87.

Before the Court are the following motions:

-- The Defendant The Exchange Club and Frances Rogers' motion for attorney fees and costs (Docket Entry NO. 136);

-- The Defendant David McMillan's motion for award of attorney fees (Docket No. 139);

–The Defendant Robert Todd Jackson's motion for attorney fees and costs (Docket Entry No. 144)

–The Defendant Candi Noelle Chaffin's motions for assessment of costs and for entry of judgment upon motion for attorney fees, (Docket Entry Nos. 146 and 166);

–The Plaintiff Ellis' motion of evidentiary deposition (Docket Entry No. 154).

As to the Plaintiff's motion to take evidentiary depositions, from a review of this motion, the Plaintiff desires to depose an attorney regarding settlement negotiations amongst defense counsel and his former counsel. This motion should be denied. First, given the Plaintiff's notice of appeal, this Court lacks subject matter

jurisdiction to permit general discovery. *Pittock v. Otis Elevator,* 8 F.3d 325, 327 (6th Cir. 1993). To the extent that the Court retains jurisdiction over the Defendants' attorney fees applications, the Supreme Court has admonished that "[a] request for attorney's fees should not result in a second major litigation". *Hensley v. Eckhart*, 461 U.S. 424, 437 (1993). The Court concludes that this deposition is unnecessary to address the amount of time expended by defense counsel on the discussions of settlement with Plaintiff's former attorney. Thus, Plaintiff's motion for an evidentiary deposition should be denied.

Under 42 USC Section 1988, attorneys fees may be awarded if the "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith". *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694, 541 L.Ed.2d 648 (1978). The decision to award attorneys fees is committed to the discretion of the trial judge. *Tarter v. Raybuck*, 742 F.2d 977, 986 (6th Cir. 1984), *cert. denied,* 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985).

"In seeking to determine whether a suit is frivolous, unreasonable or groundless, courts have focused on several factors. Among those considered are whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a real threat of injury to the plaintiff; whether the trial court has made a finding that the suit was frivolous under the *Christianburg* guidelines, and whether the record would support such a finding. *Id.* adopting and quoting the Seventh Circuit rule, (citations omitted).

28 USC Section 1927 also provides for an award of attorney fees where an attorney "multiplied the proceedings in any case unreasonably and vexatiously". "Unreasonably and vexatiously" means "an intentional departure from proper conduct or, at a minimum, a reckless disregard of the duty owned by counsel to the Court". *United States v.*

Ross, 535 F.2d 346, 349 (6th Cir. 1976). Congress amended Section 1927 to authorize and award of attorneys fees. See *FifthThird Bank v. Boswell,* 125 F.R.D. 460, 463 (S.D. Ohio1989).

An attorney does not have carte blanche to burden federal courts by pursuing claims that counsel should know are frivolous. *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir.1986). Yet, "[u]nintended, inadvertent or negligent acts will not support an award under Section 1927 even if significant costs are incurred by the Court and opposing parties as a result thereof". *Id. In re: Ruben,* 825 F.2d 977, 983 (6th Cir. 1987).

The Court remains of the view that the Plaintiff did not have objective reasonable grounds to pursue these claims. This finding is underscored by the Plaintiff's own counsel' statement that the Plaintiff's claims lack merit. The Court further finds that this action was brought for harassment and was an effort to circumvent a legitimate state court proceedings. The Plaintiff continues to engage in making impertinent and scandalous allegations against the Defendants, notwithstanding the express warning of the Magistrate Judge not to do so. Yet, Plaintiff and his counsel persist in making slanderous remarks about the parties and their counsel as well as about the Magistrate Judge.

As to the defendants' applications for awards of attorney fees, the Court has considered affidavits of their counsel (Docket Entry Nos. 138, 141, 143, 145 and 148) and concludes that the hourly rates of defense counsel are reasonable. Based upon the Court's review of the file in this action, including the numerous filings by Plaintiff and the subject matter of the pending motions, the amount of time expended by counsel in this action is reasonable.

In his opposition to the motions for awards of attorneys fees, the Plaintiff, in effect reiterates his substantive arguments as to why his complaint should not have been dismissed.

The Court therefore concludes that the Defendants The Exchange Club and Frances Rogers are entitled to $35,654.50 in attorney fees and expenses in the amount of $1,172.03. See Docket Entry No. 138. The Defendant David McMillan is entitled to attorney fees in the amount of $13,257.00 in attorney fees as well as $3,642.00 in attorney fees for filing the motion to show cause, but those latter fees are assessed against Mark Lane, Plaintiff's former counsel. See Docket Entry Nos. 141 and 143. The Defendant Jackson is entitled to $34,306.25 in attorney fees and $595.64 in expenses. See Docket Entry No. 145. The Defendant Candi Noelle Chaffin is entitled to $9,375.00 in attorney fees, of which $3000 is assessed against Mark Lane, Plaintiff's former counsel, in connection witht the motion to show cause. An appropriate Order is filed herewith.

United States Court of Appeals
For the Sixth Circuit

Case No. 02-5740

Marcus C. Ellis,
Plaintiff - Appellant

vs.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, The Exchange Club,
Defendants - Appellees

Order affirming Dismissal
filed Feb. 6, 2003

Before: Siler, Daughtrey and Cole, Circuit Judges.

Marcus C. Ellis appeals a district court judgment that dismissed his civil rights action filed under 42 USC Section 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Ellis filed his complaint and an amended complaint in the district court by counsel, alleging that he was denied his constitutional right to parent his child in Tennessee state-court proceedings. Ellis named as defendants Candi Noelle Chaffin, his ex-wife, Robert Todd Jackson, her attorney, Russell Heldman, the presiding state-court judge, David W. McMillan, a court appointed psychologist, the Exchange Club, a non-profit child abuse prevention agency used to facilitate court-ordered supervised child visitation,

and an individual employee of that agency, Frances Rogers. Ellis sought declaratory and injunctive relief and compensatory and punitive damages. Defendants moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition.

The defendant psychologist and the defendant attorney separately moved for the imposition of sanctions pursuant to Fed. R.Civ.P. 11, all the defendants jointly moved for oral argument on pending motions, and Ellis responded to the motions for sanctions. Among other pleadings, the defendants jointly moved the district court for an order directing plaintiff to show cause why his pleadings appear to have been signed by someone other than counsel and why his pleadings refer to non-existent crimes, criminal investigations and prosecutions. The district court granted defendants' motion for an order to show cause. Thereafter, the district court conducted a hearing. Following the hearing, the district court granted defendant' motions to dismiss, as well as the motions for Rule 11 sanctions, and entered an order accordingly. Plaintiff then moved for leave to proceed pro se and filed a FRCP 59(e) motion to alter or amend the judgment. The district court granted plaintiff leave to proceed pro se and denied his motion to alter or amend the judgment. Plaintiff timely filed notice of appeal pro se.

On appeal, plaintiff contends that he adequately stated a claim upon which relief can be granted with respect to each defendant, and contends that the district court was biased against him. In addition, plaintiff moves this court for an injunction pending appeal and for permission to depose a witness. Defendants have responded in opposition to plaintiff's motion for an injunction and essentially contend that the district court properly dismissed plaintiff's action. In addition, defendants Exchange Club, Rogers, and Chaffin move this court for sanctions pursuant to FRAP 38. Plaintiff has responded in

opposition and has filed a motion for sanctions.

Upon de novo review, see *Mann v. Conlin,* 22 F.3d 100, 105 (6th Cir. 1994); *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1239-40 (6th Cir. 1993), we will affirm the district court's judgment for the reasons stated on the record April 19th, 2002, and in the district court's order entered April 23, 2002. Further, we note that plaintiff's motions and remaining claim on appeal that the district court is biased lack merit.

Finally, we will grant the motions for sanctions filed by defendants Exchange Club, Rogers, and Chaffin. This court may award damages and costs to an appellee if the court determines that an appeal is frivolous, see Fed.R.App.P 38, and award attorney's fees if the appeal was frivolous, unreasonable, or without foundation. *Wrenn v. Gould,* 808 F.2d 493, 505 (6th Cir. 1987) (citing *Christianburg Garment Co. v EEOC,* 434 U.S.412, 421 (1978). An appeal is frivolous "if it is obviously without merit and is prosecuted for delay, harassment, or other improper purposes." *Vic Wertz Distrib.Co. v. Teamsters Local 1038,* 893 F.2d 1136, 1143 (6th Cir. 1990)(quoting *Dallo v. INS,* 765 F.2d 581, 589 (6th Cir. 1985). An appeal is unreasonable if "no reasonable person would have thought he could succeed on appeal." *Wrenn,* 808 F.2d at 505. An appeal is unfounded if "the appeal had no foundation in law upon which the appeal could be brought." *Id.*

Here, the district court granted sanctions against plaintiff's counsel pursuant to FRCP 11 because several of plaintiff's pleadings were unfounded. Indeed, the record supports defendants' contention that this litigation is vexatious. Undaunted, plaintiff appealed the district court's judgment and has continued the vexatious litigation. Under these circumstances, defendants' motions for costs and attorneys' fees are granted.

For the foregoing reasons, plaintiff's motions are denied, defendants' motions for sanctions are granted, and

the district court's judgment is affirmed. See Rule 34(j)(2)(C), Rules of the Sixth Circuit.

United States Court of Appeals
For the Sixth Circuit

Case No. 02-5740

Marcus C. Ellis,

Plaintiff - Appellant

vs.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, The Exchange Club,

Defendants - Appellees

Order denying Petition for en banc Rehearing
by Sixth Circuit, filed April 28th, 2003.
Before: Siler, Daughtrey and Cole, Circuit Judges.

"The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

United States Court of Appeals
For the Sixth Circuit

Case No. 02-5740

Marcus C. Ellis,

Plaintiff - Appellant

vs.

The Honorable Russell Heldman, Robert Todd Jackson, Candi Noelle Chaffin, David W. McMillan, Frances Rogers, The Exchange Club,

Defendants - Appellees

Order granting fees and costs
by Sixth Circuit, filed April 28th, 2003.

Before: Siler, Daughtrey, Cole, Circuit Judges

Upon consideration of the motions filed by appellees, Robert T. Jackson, Candi Chaffin, The exchange Club, Frances Rogers and David McMillan for fees and costs, further considering the appellant's response in opposition, it is ordered that the motions be and they are hereby granted. The following appellees are awarded the following fees and costs. Robert T. Jackson, $750.00 fees and $282.31 costs, Candi Chaffin, $750.00 fees and $17,21 costs, The Exchange Club and Frances Rogers $750.00 fees and $854.09 costs and David McMillan $750.00 fees and $236.86 costs.